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Supreme Court of the United States

No. 390

SEABOARD AIR LINE RAILROAD COMPANY, AP-
PELLANT,
versus

JOHN M. DANIEL, AS ATTORNEY GENERAL OF THE STATE
OF SOUTH CAROLINA, AND W. P. BLACKWELL, AS SEC-
RETARY OF STATE OF SOUTH CAROLINA, APPELLEES.

APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH
CAROLINA

BRIEF FOR APPELLEES

JOHN M. DANIEL,
Attorney General,
IRVINE F. BELSER,
Assistant Attorney General.
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BRIEF FOR APPELLEES

INTRODUCTORY SUMMARY

This suit was instituted in the original jurisdiction of the South Carolina Supreme Court for the purpose of obtaining relief from the South Carolina constitutional and statutory provisions requiring all railroad corporations operating within the State to be incorporated under the laws of the State.

The Complaint alleged that the Interstate Commerce Commission had authorized the appellant, which was a Vir-

ginia corporation, to acquire and operate all the railroad property of the old Seaboard Air Line Railway Company, including that in the State of South Carolina, and also that the said Commission, while finding that the cost of complying with the South Carolina provisions would not be unduly burdensome, nevertheless found that the delays and needless expense incident thereto did not accord with the national transportation policy.

The Answer of the defendants-appellees admitted that the Interstate Commerce Commission had made the findings as shown in the report attached to the Complaint but denied the accuracy of its findings and conclusions and alleged that the appellant company could comply with the order and report of the Commission without overriding the South Carolina statutory and constitutional provisions requiring incorporation under the laws of the State.

Appellant company demurred to the Answer, thereby admitting the allegations of fact contained in the Answer. No testimony was taken and the case was heard upon the issues raised by the pleadings.

The Supreme Court of South Carolina refused the relief demanded by the appellant, holding in effect that under the Interstate Commerce Act, as amended by the Transportation Act, the Interstate Commerce Commission had no power to relieve the appellant company from complying with the South Carolina statutes, and further that the said report of the Commission itself showed that the cost of complying with the South Carolina statutes did not constitute an undue burden upon interstate commerce.

It is submitted that the judgment of the South Carolina Supreme Court should be affirmed and this appeal dismissed because:

(1) The Interstate Commerce Act, as amended by the Transportation Act of 1940, prohibits "the creation, directly or indirectly, of a federal corporation", recognized the necessity for such corporations to comply with "applicable state law" and did not intend to affect state laws requiring such corporations to be chartered under state laws; nor did said Act authorize the Interstate Commerce Commission to relieve railroad corporations from compliance with such state laws as to the incorporation of railroad corporations.

U. S. Code Annotated, Title 49, 1946 Cumulative Supplement, page 68;

Texas v. United States, 292 U. S., 522.

It is the general principle that the corporate powers of corporations are limited to the states of their creation and that their rights to operate in other states are subject to the terms and conditions imposed by such other states.

23 American Jurisprudence, pp. 27-28.

(2) The Interstate Commerce Commission, in its report and order, found in effect that it was not clear that the cost of complying with the South Carolina statutory requirements, that is, an initial expense of \$71,800.00 and a continuing expense thereafter of \$1,000.00 a year "would be unduly burdensome" and while it found that the "needless expense and delay" incident to such compliance "would not accord with the national transportation policy", such finding did not really amount to a finding that compliance with the South Carolina statutes would constitute an undue burden upon interstate commerce; but if it did so intend to find, such finding was unsupported by its other findings and hence arbitrary and void.

(3) The last three points raised in the appellant's argument (pp. 35-49) were not really raised or elaborated by

appellant in its argument in the court below, points 3 and 5 not being raised at all, and hence should not be considered by this Court; but in any event, it is submitted that there is no merit in the contentions of appellant company that it is relieved of compliance with the state constitutional and statutory requirements irrespective of the order and findings of the Interstate Commerce Commission. The appellant is not in fact an instrumentality of the federal government, as alleged in point No. 3 (pp. 35-40) and it is in fact engaged in intrastate as well as interstate commerce (see appellant's argument, pp. 41-48), and as to point No. 5, the State of South Carolina has a perfect right to classify railroad corporations separately from other foreign corporations by reason of their essentially different characteristics.

44 American Jurisprudence, pp. 244-245.

(4) The South Carolina constitutional and statutory requirements as to railroad corporations being incorporated in the State of South Carolina is a valid exercise of state's powers over foreign corporations engaged in both intrastate and interstate commerce in the State of South Carolina.

STATEMENT AS TO THE FACTS

This suit was commenced by the appellant railroad company in the original jurisdiction of the South Carolina Supreme Court, by Complaint and Rule to Show Cause, dated August 7, 1946, for the purpose of obtaining relief from the constitutional and statutory provisions of South Carolina requiring railroad corporations to be incorporated under the laws of the State (R. pp. 1-18).

In the Complaint it was alleged in effect that the Interstate Commerce Commission had undertaken to relieve the appellant company from compliance with such consti-

tutional and statutory provisions of the State of South Carolina, and the original jurisdiction of the Supreme Court of South Carolina was invoked for the purpose of determining particularly whether appellant was relieved from such prohibitions "as a legal consequence of the approval and authorization by the Interstate Commerce Commission in its Report and Order aforesaid, by virtue of the provisions of Section 5 (11) of the Interstate Commerce Act (49 U. S. C. A. 5(11))" (R. P. 17).

In the Complaint certain of the findings of the Interstate Commerce Commission were quoted (R. pp. 6-12) and attached to the Complaint, as an Exhibit, was a copy in full of the Order of the Commission relied upon by appellant (R. pp. 57-134), as well as a copy of the Supplemental Application and Amendment (R. pp. 23-56). The Commission in its Report found in effect that the revenues for 1945 assigned to the 736 miles of appellant's railroad system in South Carolina amounted to over \$25,000,000.00 (R. p. 111—F. 422); that the cost of complying with the South Carolina statutes for incorporation were estimated, as an initial outlay, at \$71,800.00 and a continuing expense thereafter at approximately \$1,000.00 per year (R. p. 110—F. 438); and that it was not clear that such expense "would be unduly burdensome" (R. pp. 111-112, ff. 443-445). The Commission further found, under its interpretation of the *Texas case* (292 U. S., 522), that "the delays and needless expense" incident to complying with the South Carolina statutes "would not accord with the national transportation policy and would not be consistent with the public interest" (R. p. 113, F. 450); but that the new company would be relieved from "the restraints, limitations and prohibitions of state law only insofar as may be necessary to enable it to carry into effect the transactions approved and provided for" (R. p. 113, F. 451).

The Answer of the defendants-appellees admitted that the Interstate Commerce Commission had made the order and report and findings referred to in the Complaint, but alleged in effect that the company could comply with the Order of the Commission "without conflicting with the Constitution and Statutory Laws of the State of South Carolina" and further that the Order of the Interstate Commerce Commission, insofar as it undertook to override the Constitution and laws of the State was null and void and beyond the scope and powers of the said Commission (R. p. 140). Appellees further alleged that the Attorney General of the State, who is charged with the defense of the interest of the state in such matters, was not notified of any such application or proceeding before the Interstate Commerce Commission (R. p. 141) (although admitting that the Governor of the state was so notified); and the appellees further denied the accuracy of the findings of fact contained in the Order of the Commission undertaking to set out the cost of conforming to the Constitution and laws of the State of South Carolina, and denied that compliance with the Constitution and laws of the State of South Carolina would place an undue burden on interstate commerce (R. p. 142). Appellees further alleged in their Answer that to permit plaintiff-appellant to do business in South Carolina without conforming to the provisions of the Constitution of the State and its statutes, would be denying to the state and its citizens many of the rights and privileges to which they were entitled (R. p. 144); and further that the appellant company was engaged in both intrastate and interstate commerce and that compliance with the provisions of the South Carolina Constitution and statutes would not conflict with the provisions of the interstate commerce Act or with the valid

portions of the Order of the Interstate Commerce Commission.

The appellant company filed a Demurrer to the Answer of the appellees, claiming in effect that by reason of the Order and Report of the Interstate Commerce Commission none of the defenses or issues raised by the Answer were available to the appellees (R. pp. 147-151). In the Demurrer, appellant also contended that the Report and Order of the Commission is conclusive unless and until set aside in a direct proceeding for that purpose instituted pursuant to the provisions of Section 207(1) of the Judicial Code of the United States (28 U. S. C. A. 41(27)) (R. p. 148). It also claimed that the constitutional and statutory provisions referred to imposed an unreasonable and undue burden on interstate commerce irrespective of the findings and conclusions of the Report and Order of the Commission (R. pp. 150-151).

Under the South Carolina practice, a demurrer admits all of the well-pled allegations of fact contained in the pleading demurred to. See the following, among many other cases, supporting this principle:

Spigner v. Ins. Co., 148 S. C. 249, 252, 146 S. E. 8, 9;

State v. Broad River P. Co., 177 S. C. 240, 266, 181 S. E. 41, 52;

Pres'n C. v. York Depository, 203 S. C. 410, 415, 27 S. E. (2d) 573;

McLeod v. Sou. Ry. Co., 188 S. C. 14, 21, 198 S. E. 425;

Ward v. Town of Darlington, 183 S. C. 263, 270, 190 S. E. 826;

Oliveros v. Henderson, 116 S. C. 77, 81, 106 S. E. 865;

Henderson v. McMaster, Ins. Commis., 104 S. C. 268, 272, 88 S. E. 645;

Interstate Commerce Act, Section 5;

Constitution, Article 1, Section 8, Clause 3.

The case was argued before the South Carolina Supreme Court twice.

At the first argument, the principal issue was whether or not by reason of the Report and Order of the Interstate Commerce Commission, the appellant company was relieved from compliance with the South Carolina constitutional and statutory provisions requiring incorporation under the laws of the State and whether the Interstate Commerce Commission went beyond its jurisdiction in undertaking to say in what state, in the public interest, a railroad corporation should be chartered (R. p. 154).

The Court adverted to the Section (208) of the United States Judicial Code (28 U. S. C. A., Section 46), providing that suits to set aside orders of the Interstate Commerce Commission must be brought in the Federal District Court and, therefore, set the case down for re-argument on this point, saying:

"The briefs submitted by counsel for the plaintiff and the defendants do not bear, except indirectly, upon the question whether under the federal law this court should entertain jurisdiction at all to pass upon the validity of an order of the Interstate Commerce Commission such as appears to be presented here. It would seem to follow logically that if jurisdiction exists to declare the order valid, it also exists to pronounce it invalid, and hence set aside and annulled—this latter alternative being prohibited by the federal law."

Upon the re-argument, which occurred at the March, 1947, term of Court, it was conceded by counsel for appel-

lant company that the South Carolina Supreme Court had "jurisdiction to determine whether the order of the Commission was a valid or invalid exercise of power under Section 5 of the Interstate Commerce Act" (R. p. 159). The South Carolina Supreme Court, after adverting to the relevant provisions of the Interstate Commerce Act (Section 5, Paragraph 11) (R. pp. 159-160)), in a well-reasoned decision, held in effect, as we interpret the decision, (1) that the Commission had no power under the said Act to relieve the appellant from compliance with the state laws as to incorporation (R. pp. 160-161), and, further (2) that the Report itself shows that the expense incident to complying with the state laws did not constitute an undue burden upon interstate commerce, saying *passim*:

"We think it clear from the whole quoted section that the prohibition against the creation, directly or indirectly, of a federal corporation likewise excluded any power to control, limit or prohibit incorporation under state laws. And it follows that no power was conferred upon the Commission to say in what state or states a railroad company may be incorporated or not incorporated. . . .

"The Interstate Commerce Act not only fails to specifically grant authority to the Commission to deal with the matter (fol. 161) of charters, but it may be inferred, as we have pointed out, from the language used that the purpose of congress was to prohibit the Commission from directly or indirectly determining what state or states a railroad company should be incorporated in.

"Unquestionably, the Commission acted within the scope of its authority in passing upon and approving the details of the reorganization plan of the Seaboard Air Line Railway, its method of financing, and whether the reorganization plans were for the best interest of interstate commerce. But it is far from clear that the Act conferred upon it the power to discriminate, in

effect, against any state or states by adjudging in what state a charter should be granted.

"The plaintiff contends that to comply with the statutes of South Carolina and the constitutional provision requiring that railroads operating in this state should obtain a charter, would impose an undue burden on interstate commerce.

"As shown by the report and order of the Commission, the cost incident to obtaining a South Carolina charter is negligible as compared with the millions of dollars in value of the physical properties and the millions of dollars of income owned and controlled by the plaintiff. It might be inconvenient or undesirable to obtain a South Carolina charter, but we do not see how such requirement would constitute a burden on interstate commerce."

It is appellees' position that the aforesaid judgment and opinion of the South Carolina Supreme Court is entirely sound, that the conclusions therein contained are well founded, and hence this appeal should be dismissed.

It is to be noted that this case comes before this Honorable Court without any evidence having been taken in the Court below but upon the issues raised by the pleadings, in which the appellees have denied the accuracy of the essential findings of fact by the Interstate Commerce Commission upon which the Complaint was based, and which denials in view of the Demurrer admitting the allegations of fact contained in the Answer, are to be accepted as valid and binding, both as to the Court below and by this Honorable Court.

It is our primary position that Congress did not intend, either by its own enactments (that is, by the Interstate Commerce Act as amended by the Transportation

Act of 1940), or to authorize the Interstate Commerce Commission, to relieve the appellant company from compliance with the laws of the State of South Carolina or any other State as to incorporation under the laws of any such state. It is our secondary position (a) that the Interstate Commerce Commission's Order and Report did not in reality intend to find that relief from the South Carolina statutes requiring state incorporation was actually necessary or that compliance therewith would be an undue burden upon interstate commerce, but (b) that if it did so intend to find, its other findings and the undisputed facts show that such finding was arbitrary and unreasonable and hence invalid.

ARGUMENT

I

Interstate Commerce Act did not undertake to relieve Appellant Corporation from complying with State laws as to incorporation.

It is submitted that the terms of the Interstate Commerce Act and also of the Transportation Act show that Congress did not intend to relieve railroad corporations from compliance with state laws as to the chartering or incorporation of railroad corporations or to authorize the Interstate Commerce Commission to relieve railroad corporations from such compliance.

Section 5 of the Interstate Commerce Act (49 U. S. C. A. 5) Par. 11;

Panhandle Eastern Pipe Line Company v. The Public Service Commission, (Decided December 15, 1947; Reported in United States Law Week, Section 4, 16 L. W. 4051);

Texas v. United States, 292 U. S. 522, 78 L. Ed. 1402;

44 American Jurisprudence, Page 543.

See also:

Eagle Ins. Co. v. Ohio, 153 U. S. 446, 38 L. Ed. 778, 14 S. Ct. 868;

International & G. N. R. Co. v. Anderson County (Tex. Civ. App.) 174 S. W. 305, affirmed in 246 U. S. 424, 62 L. Ed. 807, 38 S. Ct. 370;

Chicago, B. & Q. R. Co. v. Illinois, 200 U. S. 561, 592, 59 L. Ed. 596, 609, 26 S. Ct. 341, 4 Ann. Cas. 1175;

Napier v. Atlantic Coast Line R. Co., 272 U. S. 605, 71 L. Ed. 432, 47 S. Ct. 207;

Illinois C. R. Co. v. Public Utilities Commission, 245 U. S. 493, 510, 62 L. Ed. 425, 438, 38 S. Ct. 170, P. U. R. 1918-C, 279;

Missouri, K. & T. R. Co. v. Harris, 234 U. S. 412, 419, 58 L. Ed. 1377, 1382, 34 S. Ct., 790;

Savage v. Jones, 225 U. S. 501, 533, 56 L. Ed. 1182, 1194, 32 S. Ct. 715;

Cummings v. Chicago, 188 U. S., 410, 430, 47 L. Ed., 525, 531, 23 S. Ct., 472.

It has been recognized by this Honorable Court by the above-cited case of *Panhandle Eastern Pipe Line Company v. The Public Service Commission* (decided December 15, 1947) that the states' regulatory power as to interstate commerce is excluded only from the field explicitly occupied by Congress, and that the general rule is that state regulation continues except when Congress has expressly taken over. It is also the general rule that the intention of Congress to exclude the exertion of state regulatory power must have been clearly manifest before it can be said that

Congress has occupied the field or that it intended to delegate such superior power to the Interstate Commerce Commission. (See the cases above cited):

- 153 U. S. 446, 38 L. Ed. 778, 14 S. Ct. 868;
- 174 S. W. 305, affirmed in 246 U. S. 424, 62 L. Ed. 807, 38 S. C. 370;
- 200 U. S. 561, 592, 50 L. Ed. 596, 609, 26 S. Ct. 341, 5 Ann. Cas. 1175;
- 272 U. S. 605, 71 L. Ed. 432, 47 S. Ct. 207;
- 245 U. S. 493, 510, 62 L. Ed. 425, 438, 38 S. Ct. 170, P. U. R. 1918-C 279;
- 234 U. S. 412, 419, 58 L. Ed. 1377, 1382, 34 S. Ct. 790;
- 225 U. S. 501, 533, 36 L. Ed. 1182, 1194, 32 S. Ct. 715;
- 188 U. S. 410, 430, 47 L. Ed. 525, 531, 23 S. Ct. 472.

In the light of the above-cited principles, it is important to note the exact language and provision of the Transportation Act of 1940, as follows: (See U. S. Code Annotated, Title 49, 1946 Cumulative Supplement, Page 68):

"(11) The authority conferred by this section shall be exclusive and plenary, and any carrier or corporation participating in or resulting from any transaction approved by the Commission thereunder, shall have full power (with the assent, in the case of a purchase and sale, a lease, a corporate consolidation, or a corporate merger, of a majority, **unless a different vote is required under applicable State law, in which case the number so required shall assent**, of the votes of the holders of the shares entitled to vote the capital stock of such corporation at a regular meeting of such stockholders, the notice of such meeting to include such purpose, or at a special meeting thereof called for such

purpose) to carry such transaction into effect and to own and operate any properties and exercise any control or franchises acquired through said transaction without invoking any approval under State authority; and any carriers or other corporations, and their officers and employees and any other persons, participating in a transaction approved or authorized under the provisions of this section shall be and they are hereby relieved from the operation of the antitrust laws and of all other restraints, limitations, and prohibitions of law, Federal, State, or municipal, insofar as may be necessary to enable them to carry into effect the transaction so approved or provided for in accordance with the terms and conditions, if any, imposed by the Commission, and to hold, maintain, and operate any properties and exercise any control or franchises acquired through such transaction. **Nothing in this section shall be construed to create or provide for the creation, directly or indirectly, of a Federal corporation, but any power granted by this section to any carrier or other corporation shall be deemed to be in addition to and in modification of its powers under its corporate charter or under the laws of any state. (Emphasis ours.)**

At the time of the enactment of the above provision by the United States Congress, it must be presumed to have been well known to the United States Congress that the matter of the incorporation of railroad companies was one wholly left to the jurisdiction and control of the various states, and also that many states required railroads to be incorporated under their own laws. In this very case both the State of South Carolina and the State of Virginia require railroad corporations to be incorporated under their laws (See Virginia Code 1942, Vol. 2, p. 2865). Notwithstanding such knowledge, the United States Congress, by the terms of the above Act, expressly provided that the state corporation laws must be recognized and that in case of the merger or consolidation of corporations, the "ap-

plicable state law" regulating the number of votes required should be followed; and further, that nothing contained in such section should "be construed to create or provide for the creation, directly or indirectly, of a federal corporation". We think it clear from a reading of the foregoing statute that Congress did not intend in any way to relieve railroad corporations from complying with state laws requiring incorporation. Also, the *Texas Case* above cited, which is heavily relied upon by the appellant corporation, expressly recognized that "railroad corporations were left under state charters". (78 L. Ed., 1411.)

It is submitted that the primary purpose of the foregoing section of the Act was to relieve railroad corporations particularly from the many state statutes prohibiting the acquisition of one railroad by another and the merger and consolidation of such railroads and from the antitrust laws. It was no part of the purpose of such statutes to trench upon the well-established doctrine that the corporate existence of a corporation is a matter which is left entirely to the several states. (See 23 American Jurisprudence, pp. 27-28, 32-33.)

Appellant argues in its brief (pp. 17-27) that the authority conferred by Section 5(2) (a) (1) and 5(2) (b), as well as by the above-quoted Section of the Act 5(11), to such a railroad corporation to acquire and operate railroad property, in itself carries authority to operate regardless of the state laws. It is submitted, however, that the only true and reasonable interpretation to be placed upon the said provision is that the authority therein conferred is subject to an implied condition, that the company shall comply with all proper state laws, that is to say, with all state laws which do not constitute an undue burden upon interstate commerce.

In the light of the foregoing principle, it is plain that for the Act to have had the effect contended for by appellant, it should have provided in express terms that railroad corporations should no longer be required to take out state charters, or that the Interstate Commerce Commission should have been granted express power to relieve such corporations from taking out state charters.

On the contrary, the Act expressly provided that the section should not be construed to create or to provide for the creation, directly or indirectly, of a federal corporation. It is submitted that if the findings and order of the Commission should be given the effect claimed by the appellant herein, then the Virginia charter of the said corporation, as so amended, would be in effect a federal corporation. Moreover, it is clear, it is submitted, that the Act did not in any way intend to relieve such a company of the necessity for complying with such a state law as to incorporation.

As a matter of fact, the state law expressly provides that any railroad company, even though incorporated under a foreign state, may merge and consolidate with any other railroad company organized and operated under the laws of the state (see Section 8285, as quoted in Appellant's Brief pp. 55-56), so that there is in reality no real prohibition against the appellant operating in the State of South Carolina, but only a method whereby it may comply with the state constitution and statutes designed to promote the welfare and well-being of the state and its citizens.

It is also to be noted that the Act, by its terms, undertakes to relieve such railroad corporations from "restraints, limitations and prohibitions of law" only "insofar as may be necessary to enable them to carry into effect transactions so approved or provided for", and in this case

it must be apparent that it was, and is, not necessary for the appellant company to be relieved from compliance with the South Carolina provisions as to incorporation in order for the appellant to carry out transactions provided for in the order of the Commission. In fact, as already pointed out, the Commission itself found that there was no such necessity, though it is our position that such finding, even if made, would be invalid and beyond the powers of the Commission.

It is obvious that the matter of incorporation of a railroad company does not stand in the category of ordinary "restraints, limitations and prohibitions of law"—the matter of its incorporation goes to the very existence of the corporation in the state in question, the foreign corporation having in fact no real existence except by the license or permission of the state of its incorporation and other states where it is permitted to operate (see 23 American Jurisprudence, pp. 27-28, 32-34).

By the same token, the provision of the Act to the effect that any power granted by the Section should be "deemed to be an addition to and in modification of its powers under its corporate charter" means that such amendments so created are to be considered co-extensive with, and limited to, the state of creation of the corporation in question.

Texas case, relied upon by appellant company, does not support Appellant's contentions.

Appellant relies heavily upon the case of *Texas v. United States* (292 U. S., 522, 78 L. Ed., 1402). It is submitted, however, that that case, when properly interpreted in the light of the narrow holding therein contained and in the light of the facts of this case as compared with the

facts there existing, is in reality authority for the appellees in the case at bar.

In that case, as found by the Court, the question really involved was as to the maintenance of the "general offices" of the company in the State of Texas, it appearing that the general offices had for years been maintained elsewhere, and it did not involve the public or principal office of the company. In that case, the record showed that the net income of the company varied between the years 1926 and 1931 from no income in 1931, \$95,655 in 1930, and a maximum in 1928 of \$598,172, whereas the maintenance of the "general offices" would require an annual necessary expense of approximately \$81,100 a year (see 78 L. Ed., Page 1407), and the company itself conceded that notwithstanding its claim to relief from the obligation to maintain its "general offices" in Texas, it would still be liable to maintain "a public office or place in this State for the transaction of its business, where transfers of stock shall be made, and where shall be kept for inspection by the stockholders of such corporations, books, in which shall be recorded the amount of capital stock subscribed, the name of stockholders, etc., and transfers, the amount of its assets and liabilities, and the names and places of residence of its officers." (See 78 L. Ed., Page 1409.)

Counsel for applicant company also conceded in effect that the lease in question required the Texas company to maintain its **principal office** in Texas, as the Texas statute required (see 78 L. Ed., page 1410). This Honorable Court then concluded that in view of the narrow scope of the issue as so presented, the action of the Commission in approving the lease relieving the company of its obligation to maintain its "general offices" in Texas should be approved, saying:

" * * * In view of the disclaimer on behalf of the United States and the Interstate Commerce Commission, and the interpretation placed upon the provision in the lease, we assume that the question before us merely related to the abandonment or removal of 'general offices', shops, etc., as distinguished from the 'public office' required by the Texas statutes, that is, to those transportation facilities the continued maintenance of which, in the circumstances described by the findings of the Commission, would entail unnecessary and burdensome expenditures in operation. As thus construed, we find no ground for concluding that the approval of the provision in the lease was beyond the Commission's authority. There is no interference with the supervision of the State over the lessor in matters essentially of state concern, as distinguished from the operations in which their effect upon interstate commerce are of national concern."

78 L. Ed., Page 1410.

There was in that case no question involved as to the relieving of the Texas Company from any obligation to take out a Texas charter and in fact the decision expressly recognized the obligation of the company to maintain a "public office", that is "its principal office", in Texas, as the Texas statute required, for the convenience of the state and citizens of Texas. The decision also recognized the right of the state to exercise supervision of a railroad company in the matters essentially of state concern.

In the case at bar it is submitted that an initial total outlay of \$71,800 and a continuing expense thereafter of \$1,000 per year could not be deemed excessive. It would seem that the expense incident to the maintaining of the public or principal office of that company in the State of Texas would have required a much greater expense than that involved in the case at bar.

In that case also, as already pointed out, this Court noted that "railroad corporations were left under state charters". This Court further referred to the case of *International and G. N. R. Co. v. Anderson County* (246 U. S., 424, 62 L. Ed., 807), in which the state court had found upon the verdict of a jury that the maintenance of the offices and shops involved would not impose an undue burden upon interstate commerce, saying that this was "a finding which this court found no reason to disturb", thereby showing that this court does give weight to the finding of the State court on the question of undue burden upon interstate commerce. It is submitted that upon a careful analysis the above-mentioned *Texas Case* does not in reality support appellant's position in the case at bar.

Powers of corporations limited to states by which created.

It is settled by cases too numerous to require citation that while Congress has supreme power to regulate interstate commerce, nevertheless the states do have power to make regulations which may affect interstate commerce, provided such regulations are not excessive and do not create an undue burden thereon. It is in pursuance of this power that the many instances in which the regulatory power of the states over corporations engaged in interstate commerce have been upheld and approved by this Honorable Court. The states have, and must have, in the exercise of their police power and for the benefit of their citizens the right to regulate all corporations, in certain instances, operating within their boundaries.

The requirement that railroad corporations shall take out state charters in the State of South Carolina is an exercise of this type of power, this type of power generally

being defined as falling within the police powers. This Court has repeatedly recognized that it is in the public interest that the right of the states to make such regulations should be continued and not disturbed.

"Sec. 30. **Power to Regulate.**—The basis of governmental power to regulate railroads lies in the public interest pertaining to them, their character as common carriers, their role as public highways, their danger to life and property, the police power of the state, and, in the case of Congress, its interstate commerce power. . . ."

44 American Jurisprudence, Pp. 242-243.

In the case at bar, the Interstate Commerce Commission undertook to travel beyond, and outside of, the scope of its true powers and to interpret and construe the law in the light of its construction of the decision in the above-cited *Texas case*. Having first found in effect that to require the corporation to comply with the South Carolina statutes by being incorporated in South Carolina and thereafter consolidating with the Virginia corporation would not be unduly burdensome (R., P. 112; F. 445), the Commission then undertook, upon its interpretation of the said *Texas Case* to ascertain what it understood to be the policy of Congress and to say what would not accord with the national transportation policy. In this respect it is submitted that the Commission went entirely out of its sphere and proper field. This expression of its opinion as to the national policy, it is submitted, was beyond the power conferred upon it by the Interstate Commerce Act or by the Transportation Act and was a nullity.

The foregoing principles, it is submitted, are fully supported by authority and indeed might be classed as

elementary. The general rule is thus stated in 23 American Jurisprudence:

"Sec. 15. Generally. * * *

"With respect to governing rules in the law of foreign corporations, it must be constantly borne in mind that no state has the power to create corporations, or to regulate their powers, or to authorize the exercise of corporate franchises, in other states. It may confer powers, in the nature of a commission, to be exercised anywhere, on condition that their exercise be assented to by the state or sovereignty where their exercise is sought; but without this assent, express or implied, such powers would be nugatory outside the state granting them. This is on the principle that the laws of a state can have no binding force, *proprio vigore*, outside the territorial limits and jurisdiction of such state. No rule of comity will allow one state to charter corporations to operate in another state unless there is willingness on the part of the foreign state that it should be so. * * *

"Sec. 16. Doctrine Confining Corporate Existence to Incorporating Sovereignty.—In the American law of foreign corporations, it is a well-recognized and probably, as properly construed, a basic doctrine that a corporation can have no legal existence out of the boundaries of the sovereignty by which it is created. This doctrine is founded upon the consideration of the nature of a corporation as an artificial being, invisible and intangible, existing only in contemplation of law and, by the force of law. Where that law ceases to operate, therefore, and is no longer obligatory, the corporation can have no existence."

23 American Jurisprudence, Pp. 27-28.

II

Interstate Commerce Commission did not really find Appellant Company should be relieved from compliance with state law as to incorporation.

It is also submitted (a) that the Interstate Commerce Commission did not really intend to find that it was necessary, as contemplated under the Interstate Commerce Act, in order to enable the appellant company to carry out its order, for the appellant company to be relieved of the requirement of the South Carolina Constitution and Statute as to incorporating under the laws of the State, but (b) if it did so intend to find, its other findings contained in its Report and Order show that such alleged finding of necessity was arbitrary and unreasonable and hence void.

The Commission's findings on this subject are incorporated in the record at pages 108-113.

(A)

The Commission first found that there were two ways of complying with the South Carolina requirements either (a) by forming a separate subsidiary corporation, or (b) by forming a separate South Carolina corporation and then consolidating that corporation with itself (R. P. 110, ff. 436-437), and that the expense of the latter course would require "an initial outlay estimated at \$71,800.00 and a continuing expense estimated at approximately \$1,000.00 a year". The Commission also commented upon certain other state requirements as to cumulative voting, and then used this significant language: "It is argued that the restrictions imposed upon foreign railroad corporations by the constitution and statutes of South Carolina constitute a burden on interstate commerce which we have full power under the provisions of section 5, of the act to override. . . ." (R. P. 111). It then commented upon the fact that the total operating revenues assigned in 1945 to the 736 miles of system located in South Carolina amounted to over \$25,000,000, and said that it would be an unneces-

sary and undue burden on interstate commerce to require of the company the first possible course, involving an initial expense of over \$300,000, but was "not so clear, however, that the cost of organizing a corporation under the laws of South Carolina to acquire the properties in that State and thereafter consolidate the South Carolina corporation with the Virginia corporation, viz, \$71,800, or the cost of maintaining the consolidated corporation as a South Carolina corporation, viz, \$1,000 a year, would be unduly burdensome." (R. pp. 111-112).

The Commission then, after referring to the *Texas case*, and expressing its opinion as to what would accord with the national transportation policy as it found the same to be, concluded this section by saying that the "provisions of section 5(11) will relieve the new company of the restraints, limitations and prohibition of State law **only insofar as may be necessary to enable it to carry into effect the transactions approved and provided for**, in accordance with the terms and conditions which we impose, * * * (R. p. 113).

We submit that the foregoing finding of the Commission, taken as a whole, amounts to a positive finding that the cost of complying with the South Carolina Constitution and Statutes **would not be an undue burden upon interstate commerce**. It is submitted that it was not the purpose and intent by said finding directly to relieve the company of its obligation to comply with such requirement. At most, it was an invitation to the company to go into some appropriate court, as the company afterwards did, to seek some relief and to show therein that in fact such relief was "necessary to enable it to carry into effect the transactions approved and provided for". This is apparently the course pursued by the appellant company in the case at bar, since the company, after having obtained such order, and with

the expression from the Commission as to its views of national policy, instituted this suit for the apparent purpose of obtaining such judicial relief.

(B)

It is submitted, however, that even if the Commission intended so to relieve the appellant company, such finding was in conflict with the record itself and with the Commission's other findings, was in effect arbitrary, as well as unauthorized, and hence should be disregarded.

The Commission had already found that the annual revenues assigned to the portion of the system located in South Carolina amounted to over \$25,000,000, the total assets of the company (R. pp. 123-124) amounted to \$233,509,697, the annual expenses and the reorganization expense of the company amounted to millions of dollars, and it must be too apparent for argument, that a total initial expense of only \$71,800, with a continuing annual expense thereafter of only \$1,000 a year could not constitute any undue burden upon interstate commerce. As found by the South Carolina Supreme Court, such an outlay, in view of the assets and revenues of the company, must be considered negligible. Certainly such an outlay and continuing expense could not be considered excessive. If such expense should be considered excessive and an undue burden upon interstate commerce, then of course the right of states even to tax corporations engaged in interstate commerce must be considered as destroyed. In this connection also it is to be noted that the agreement between the Reorganization Committee and the appellant company expressly provided that the company use its best efforts to become qualified, so far as required by law, to "own property and carry

on its business in all of the states where the property to be acquired . . . is located". (R. p. 47, f. 187).

It is submitted that the decision of the South Carolina Supreme Court, being, as that Court was, familiar with the South Carolina statutes and conditions on this point, is entitled to great weight and should be followed by this Honorable Court.

In appellant's argument from time to time (pp. 6-35) (See *Broad River Power Co. v. S. C.*, 281 U. S., 537, 75 L. Ed., 1023; 282 U. S., 187, 75 L. Ed., 287), it is suggested that the findings and order of the Commission were not subject to review by the South Carolina Supreme Court. In reply to this argument, however, we call attention not only to the decision of the South Carolina Supreme Court itself to the effect that it was conceded that the court had jurisdiction to determine whether the order of the Commission was valid or invalid, but we quote here below some of the more striking headnotes of the argument filed by the appellant company on the re-argument in the Supreme Court of South Carolina:

"II.

"Rights arising under Federal statutes may be enforced, as of right, in the courts of the states when their jurisdiction, as prescribed by local laws, is adequate to the occasion." (P. 5)

"III

"(3)

"This Court Has Jurisdiction to Determine Whether the Order of the Commission Was a Valid or Invalid Exercise of Power Under Section 5 of the Interstate Commerce Act." (P. 26)

“IV

“Recent Federal Statutes Have Encouraged the Jurisdiction of State Courts to First Decide Questions Relating to the Validity, Application and Construction of State Statutes.” (P. 35)

All of the above points were elaborately argued by the appellant in the court below and many cases, including cases from this Honorable Court, were cited in support of the contentions therein contained.

For the appellant now to contend that the South Carolina Supreme Court was without power to review the findings of the Interstate Commerce Commission, it would seem to us amounts to trifling with that Court.

III

No merit in Appellant Company's contention that it is relieved from complying with State law as to incorporate irrespective of report of Interstate Commerce Commission.

It is also submitted that there is no merit, under the facts of this case, in appellant's contention that appellant is not required to comply with the South Carolina constitutional and statutory requirements irrespective of the order and findings of the Interstate Commerce Commission.

Appellant advances the argument in its last three points (Pp. 35-49) that irrespective of the order and findings of the Interstate Commerce Commission, it is nevertheless relieved from compliance with the South Carolina constitutional and statutory requirements.

In answer to this contention, in the first place, it is to be noted that this position was not really relied upon in the complaint, as originally filed, which was based almost entirely upon the theory that under the order and findings

of the Interstate Commerce Commission, appellant was relieved from such compliance (See R. Pp. 2-18), but was first advanced in the demurrer (R. P. 150), and without any such specifications as are now alleged in the argument. The points raised in appellant's argument under points 3 and 5 do not seem to have been specified or argued or considered or pressed at all in the printed arguments before the South Carolina Supreme Court. Hence it is submitted that it is now unfair to the South Carolina Supreme Court for appellant to make such contentions, and they should not be considered by this Court under well established principles.

It is submitted, however, that there is no real merit in these contentions and that the cases relied upon by the appellant in support of such contentions show of themselves their inapplicability to this situation.

Point No. 3 (pp. 35-40) argues in effect that the appellant is an instrumentality of the federal government and hence can not be restricted by the State of South Carolina. If in fact appellant were an agency of the federal government, we might concede the validity of the argument (Cf. 44 American Jurisprudence, pp. 223-224), but in the case at bar, it is submitted that there is no evidence to show that the appellant company is an agency or instrumentality of the federal government. It is to be noted that the case of *Stockton v. Baltimore & N. Y. R. Co.*, (32 Fed. 9, C. C. N. J.) dealt with an Act of Congress which had expressly authorized the construction and maintenance of a railroad bridge across the Staten Island Sound to the New Jersey shore, and, of course, this direct and express Congressional authorization served to distinguish that case from the case at bar.

Moreover, as we have already pointed out, the State of South Carolina is not undertaking to prohibit the appellant company from operating in the State of South Carolina but merely seeking to require the appellant company to comply with its regulations and statutes relating to its corporate existence and designed to protect the welfare and well-being of the State and its citizens, and which requirements can be complied with by the appellant company at relatively trifling expense.

*Point No. 4 of Appellant's argument (pp. 41-48), contends in effect that the South Carolina constitutional and statutory requirements are void in and of themselves because they relate to a railroad corporation engaged in interstate commerce as well as in intrastate commerce.

It is submitted that there is no real merit in this contention as applied to the facts of this case. On this point it should be observed, of course, that the appellant company is engaged not only in interstate commerce but it is also engaged in intrastate commerce in the State of South Carolina.

Also, it is to be noted, as we have already pointed out, that the South Carolina statutes do not in reality undertake to exclude foreign railroad corporations from operating in the State but rather to provide a method whereby, by consolidating with the South Carolina corporation, they may do business in the State. This point is borne out and emphasized by the caption of the statutory provisions complained of by the appellant company, such captions being "Requisites for Obtaining Charters" (Section 7777), "How Foreign Railroad Corporations May Do Business in this State" (Section 7778); also, Section 8285 (see appellant's argument pp. 55-56) of the Code provides ex-

pressly how railroad corporations may merge and consolidate and do business in the State, and Section 7764 provides for rights and privileges granted to foreign corporations. The requirement that a railroad corporation shall also take out a charter or be merged with a South Carolina corporation, is merely an additional requirement placed upon railroad corporations.

It is, we believe, universally conceded that foreign corporations, even though engaged in interstate commerce, may be subjected to certain reasonable restrictions and conditions enacted for the welfare of the state and its citizens. This is particularly true as to laws relating to the corporate existence of the corporation in question. The whole question turns upon whether such conditions or restrictions constitute an undue burden upon interstate commerce, and, of course, it is conceded that foreign corporations engaged in interstate commerce, as such, can not be absolutely excluded from operating in interstate commerce by any state regulation, but no such question is presented in this case.

It is submitted that as a matter of public policy and reason the fact that the company is to be engaged in intrastate commerce is sufficient reason to require it to take out a South Carolina charter, and the decision of the South Carolina Supreme Court construing its own statutes should be followed by this Court.

Point No. 5 of appellant's argument (pp. 48-49) contends that the South Carolina constitutional and statutory requirements involved in this case are void as being in discrimination against railroad corporations as compared to other foreign corporations.

It is submitted, however, that there is no real merit in this point. It is settled by many authorities that the states have a wide power of classification and it must be apparent that railroad corporations have many distinguishing characteristics from practically every other type of corporations. Hence, it is submitted that this classification is valid.

This point is fully sustained by the authorities. In 44 American Jurisprudence it is said:

“Sec. 31. **Differences of Treatment and Discrimination in Regulation.**—By familiar principles, a legislature may make reasonable classification among railroads in legislating with respect to them. Such a course involves no denial of the equal protection of the laws. But, of course, unreasonable classification cannot be sustained. . . .

“The basis of power of regulation set forth in the preceding section also constitutes a basis for difference of treatment of railroads from that accorded other persons, where the difference of treatment is germane to the basis of the power. Such classification of railroads does not deny to them the equal protection of the laws. . . .”

44 American Jurisprudence, pp. 244-245.

Citing:

Chicago & A. R. Co. v. Tranbarger, 238 U. S. 67,
59 L. Ed. 1204, 35 S. Ct. 678;

Charlotte C. & A. R. Co. v. Gibbes, 142 U. S. 386,
35 L. Ed. 1051, 12 S. Ct. 255;

State v. Atlantic Coast Line R. Co., 56 Fla. 617,
47 So. 969, 32 L. R. A. (N. S.) 630;

Cleveland, C. C. & St. L. R. Co. v. Schuler, 182 Ind.
57, 105 N. E. 567, L. R. A. 1915A 884;

McGuire v. Chicago B. & Q. R. Co., 131 Iowa 340,
108 N. W. 903, 33 L. R. A. (N. S.) 706.

IV

South Carolina statutory and constitutional requirements a valid exercise of State's power over the corporate existence of foreign corporations engaged in both intrastate and interstate commerce.

Finally, it is submitted that the South Carolina constitutional and statutory requirements for the incorporation of railroad corporations under the laws of the State of South Carolina is a valid exercise of the state's regulatory power over corporations doing business within the state and hence should be upheld by this Honorable Court. As we have already pointed out in this case and as was held in the case of *Panhandle Eastern Pipe Line Company v. The Public Service Commission of Indiana* (decided December 15, 1947), the states have a wide power of regulation over corporations doing business within their boundaries and the states' power is excluded only where Congress has expressly occupied the field. See also to the same effect: *Prudential Insurance Co. v. Benjamin*, (328 U. S., 408) and *Power Commission v. Hope Gas Co.*, (320 U. S., 591).

As a matter of fact, railroad corporations have a very peculiar history in the life of each of the states. In many cases their construction has been aided by municipalities and by the states and their growth is inter-twined very closely with the life of the community. There are many special and peculiar reasons why railroad corporations may, in the interest of the state and its citizens, be required to take out charters under state laws and to be subject in a special sense to the state laws regulating corporations.

It is of course conceded that Congress has supreme power, if it sees fit, to relieve such corporations when engaged in interstate commerce from compliance with any

such state requirements, but the Congress has not in fact seen fit to do so, though it must be presumed to have realized that the chartering of railroad corporations was a matter left entirely to the several states.

Finally, it is submitted that the fact that the appellant company is to be engaged in intrastate as well as interstate commerce is abundant and sufficient justification for the requirement that it take out its charter under South Carolina laws, and the South Carolina Supreme Court's decisions construing its own statutes upon that point should be followed by this Honorable Court.

The construction of franchises enjoyed under state statutes is primarily a state matter, involving no Federal question.

Louisville & N. R. Co. v. Palmes, 109 U. S. 244,
27 L. Ed. 922, 3 Sup. Ct. 193;

Nickel v. Cole, 256 U. S. 222, 225, 65 L. Ed. 899,
905, 41 S. Ct. 467;

Vandalia R. Co. v. Indiana, 207 U. S. 359, 367, 52
L. Ed. 246, 248, 28 S. Ct. 130;

Fox River Paper Co. v. Railroad Commission, 274
U. S. 657, 71 L. Ed. 1283, 47 S. Ct. 669;

Enterprise Irrig. Dist. v. Farmers Mut. Canal Co.,
243 U. S. 157, 164, 61 L. ed. 644, 648, 37 S. Ct.
318;

Leathe v. Thomas, 207 U. S. 93, 52 L. ed. 118, 28
S. Ct. 30;

Sauer v. New York, 206 U. S. 536, 51 L. ed. 1176,
27 S. Ct. 686;

Consumers' Co. v. Hatch, 224 U. S. 148, 56 L. ed.
703, 32 S. Ct. 465;

Long Sault Development Co. v. Call, 242 U. S. 272,
61 L. Ed. 294, 37 S. Ct. 79.

CONCLUSION

For all the foregoing reasons, it is earnestly and respectfully submitted that the decision of the South Carolina Supreme Court should be affirmed and the appeal should be dismissed.

Respectfully submitted,

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